INTERIOR BOARD OF INDIAN APPEALS

Clarence Cloud v. Acting Muskogee Area Director, Bureau of Indian Affairs

29 IBIA 31 (12/15/1995)

Related Board case:
37 IBIA 126

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

CLARENCE CLOUD, Appellant	:	Order Affirming Decision
v.	:	Docket No. IBIA 94-106-A
ACTING MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	December 15, 1995

Appellant Clarence Cloud, a member of the Muscogee (Creek) Nation (Nation), seeks review of a March 15, 1994, decision of the Acting Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA), rejecting his request that the mineral rights in Tract #42, which was acquired under the Scattered Tracts Project, be assigned to him. Because of the similarity of legal issues, this case has been considered with Cherokee Nation v. Acting Muskogee Area Director, Docket Nos. IBIA 94-100-A and IBIA 94-108-A, also decided today. See 29 IBIA 17. For the reasons discussed below, the Board of Indian Appeals (Board) affirms the decision.

The background of the Scattered Tracts Project was set out in Cherokee Nation, and will not be repeated here. Tract #42 is described as the E½ SE¼, sec. 4, T. 15 N., R. 9 E., Indian Meridian, Creek County, Oklahoma, consisting of 80 acres, more or less. The tract was part of the original allotment of appellant's father, David Cloud, Creek 3429. Although the administrative record does not contain copies of many of the early documents relating to Tract #42, it states that, on or before July 30, 1919, David applied for, and received, an unconditional removal of the restrictions on the land. David died on August 26, 1921, and was survived by his wife, Minnie Scott Cloud, Creek 7662; a one-year-old son, appellant; and a two-week-old daughter, Loraine. Minnie, appellant, and Loraine each inherited an undivided 1/3 interest in the tract.

In 1929, Minnie mortgaged her interest to George S. Carman, and later gave Carman a deed to satisfy the mortgage. Minnie remarried, and she and her husband, a Mr. Biggs, were attempting to make a living by farming.

The interests inherited by appellant and Loraine became taxable in 1929, and taxes in the amount of $546.07 accrued. The interests were sold by Creek County at a tax sale in 1941.

After determining that Mr. and Mrs. Biggs had the necessary equipment and livestock to farm the land if it were purchased for their use, BIA acquired Tract #42 under the Scattered Tracts Project. On October 29, 1941, Carman and his wife, Katie, conveyed an undivided 1/3 interest in Tract #42 to:

the United States in trust for Minnie Cloud now Biggs, during her lifetime, then in trust for the Creek tribe of Oklahoma, until such time as the use of the land is assigned by the Secretary of the Interior to a cooperative group organized under the [Oklahoma Indian Welfare Act, 25 U.S.C. §§ 501-509 (1994) 1/ (OIWA)] or to an individual Indian then in trust for such group or individual.

On November 10, 1941, appellant and Loraine conveyed their 2/3 interests in the tract in the same words.

Loraine died in 1945, without having married and without issue.

Minnie died in 1996. Appellant was apparently living on the tract, and caring for Minnie, when she died. It appears that he has continuously lived on the tract since then.

In or around 1981, appellant began efforts to have the land assigned to him. On August 29, 1981, the Muscogee (Creek) National Council adopted Resolution NCA 81-68, requesting that title to the tract be conveyed to appellant. In a September 9, 1981, memorandum to the Area Director, the Okmulgee Agency Superintendent, BIA (Superintendent), recommended that the request be granted, although noting several concerns.

However, on February 27, 1982, before action was taken on appellant's request, the National Council adopted Resolution NCA 82-19, which provided:

> Section 101. No tribal lands of the * * * Nation * * *, whether held in trust by the United States, owned in fee simple by the * * * Nation, or arising as any other property right (e.g., reversionary interest or escheat), may be sold, transferred, disposed of or encumbered in any way unless the following procedures are fully complied with:
>
> A. Public Hearing, advertised twice in the thirty days prior to its being held in at least one newspaper of general circulation in each legislative District of the * * * Nation, shall be called by Ordinance, and convened by the Principal Chief.
>
> B. An Ordinance shall be required to approve the action discussed in the Public Hearing.
>
> C. A public law of the United States shall be required to assure the * * * Nation that the entity to which the property would be sold, transferred, disposed, or encumbered has legal authority to enter into said transaction with the * * * Nation.
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> * * * * * *

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1/ All further citations to the United States Code are to the 1994 edition.

> Section 104. Any action taken contrary to Section 101 of this Ordinance shall be null and void under tribal law, and said action shall be a nullity for all purposes * * *.

A February 12, 1987, letter from the Nation's Principal Chief to BIA stated that "Section 104 nullifies any action taken prior or subsequent to NCA 82-19."

It appears that BIA had taken no further action on appellant's request when a member of the Oklahoma Congressional delegation became involved in the matter. Information provided to the Congressman by BIA indicated that BIA believed an Act of Congress was necessary to assign the tract to an individual Indian. It appears that the Congressman may have been attempting to introduce such a bill.

Although appellant's request surfaced again several times, no further action was taken until the Nation sought to bring a trespass action against appellant in late 1989 or early 1990. At that time, the Area Director recommended that, until use of the land was assigned by the Secretary or until Congress enacted a transfer, efforts should be made to reach some kind of occupancy agreement.

However, apparently before any such agreement was made, on May 18, 1990, the Area Director issued a Proclamation assigning Tract #42 to appellant. The mineral rights were expressly excluded from the assignment. There is no evidence that appellant objected to the exclusion of the mineral rights in 1990.

On May 22, 1993, the National Council adopted Resolution NCA 93-21 which requested that the mineral rights in Tract #42 be conveyed to appellant. In his capacity as Speaker of the National Council, appellant provided the resolution to BIA.

By letter of March 15, 1994, the Area Director declined to convey the mineral rights in Tract #42 to appellant, stating:

> The assignment is a discretionary decision authorized by the deed language itself. As such, there are no regulations or procedures under which to evaluate your request, so I looked to other factors for guidance in considering your request, including the 1936 Act itself [OIWA], the resolutions of the * * * Nation, and the current use of the property. The * * * Nation possesses a remainderman interest in the property and has stated [its] position on the assignment in Tribal Council Resolution Nos. NCA 81-68 and NCA 93-21, dated August 29, 1981, and May 22, 1993, respectively. The resolutions request that the tract be assigned to you with no reservation of mineral interests.
>
> While I respect the decision of the Council, I did not accept their recommendation as to the mineral interests. Section 7 of the [OIWA, 25 U.S.C. § 507] provides that any royalties, bonuses,

> or other revenues derived from mineral deposits underlying lands purchased under authority of the [OIWA] shall be deposited in the Treasury of the United States and shall be available for expenditure for the acquisition of land or loans to Indians in Oklahoma as authorized by the [OIWA] and the Indian Reorganization Act of June 18, 1934 [25 U.S.C. § 461; IRA]. Given the fact that [the OIWA] specifies that the revenues from the minerals are to go to the Treasury and that they would be used for land purchases for other Indians rather than to benefit one owner, I did not believe that conveying the mineral estate is necessary for your continued enjoyment of the property for agricultural purposes.

Letter at 1-2.

Appellant appealed this decision to the Board.

The language in the deed at issue here is essentially the same as that discussed in Cherokee Nation. The Board there concluded that the interest given to the tribe after the death of the life tenant was a vested reminder subject to complete defeasance by the Secretary's exercise of the power of appointment given to him. It further concluded that the decision whether to exercise the power of appointment was discretionary, and subject to only limited review by the Board.

This case asks whether the Secretary can exercise his discretion by assigning less than the whole remainder interest to an individual Indian, thus leaving a portion of the tract with the original vested remainderman, here, the Nation.

As in Cherokee Nation, the deed at issue here limits the Secretary's discretion as to the class of persons to whom the remainder interest may be assigned. Most importantly, the deed does not allow the donee--i.e., the Secretary--to assign the tract to himself. Accordingly, the deed gives the Secretary a special power of appointment as defined in section 320 of the Restatement of Property (1940). Section 358 of the Restatement indicates that, if the donor does not show a contrary intention, the donee of a special power can exercise a full range of discretion in determining how and when to exercise the power of appointment. The comment to the section lists examples of how the power may be exercised in part. Although those examples do not include a decision not to appoint the mineral rights, the comment specifically states that its examples are not all inclusive, but are instead areas about which specific questions have arisen. See also section 23.48 of American Law of Property (1952).

The deed at issue here evidences an intent to restrict the Secretary's discretion only as to the class of persons to whom the property may be assigned. Accordingly, the Board concludes that the Secretary has full discretion as to how and when to exercise his power of appointment, including discretion to assign less than the whole interest in the tract.

Appellant argues only that the decision is contrary to the expressed wishes of the Nation and that the decision was arbitrary and without basis

in law or equity because there is no distinction between the methodology which the Area Director used in determining to assign the surface rights, but not to assign the mineral rights. There is no evidence in the administrative record, and appellant has not argued, that there are any mineral deposits underlying Tract #42.

The Area Director states that his decision was based on 25 U.S.C. § 507, which provides

> [t]hat any royalties, bonuses, or other revenues derived from mineral deposits underlying lands purchased in Oklahoma under the [OIWA] or [the IRA], shall be deposited in the Treasury of the United States, and such revenues are hereby made available for expenditure by the Secretary of the Interior for the acquisition of lands and for loans to Indians in Oklahoma.

The Area Director apparently attempted to follow the spirit of this statute by not assigning the mineral rights to an individual Indian, but instead leaving them for the time being with the Nation, which represents all of its members.

Because it is not necessary to the disposition of this case, the Board offers no opinion as to any possible effect of 25 U.S.C. § 507 should valuable mineral deposits be discovered under Tract #42. However, it concludes that the Area Director has provided a reason for his decision not to assign the mineral rights in Tract #42 to appellant, and that appellant has not shown that this reason is arbitrary or contrary to law. Furthermore, as in Cherokee Nation, while the opinion of the affected tribe may be taken into consideration by the Area Director in reaching a decision, that opinion is not determinative of the outcome.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the March 15, 1994, decision of Acting Muskogee Area Director is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge